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No._____

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

GILES GARMON, ET AL.,
Petitioners

V.

MICHAEL A. GALVAN,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE FUNCTION OF PREPARING A WRITTEN REPORT OF PROBATION VIOLATIONS TO STATE COURT JUDGES AND OTHER OFFICIALS IN THE JUDICIAL PROCESS ENTITLES A PROBATION OFFICER TO QUASI-JUDICIAL IMMUNITY FROM LIABILITY FOR MISTAKES IN THE REPORT.

PARTIES

Petitioners are Peggy Grose, Giles Garmon and the Travis County Adult Probation Department, the defendants in the district court.

Respondent is Michael A. Galvan, the plaintiff in the district court.

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IN THE
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GILES GARMON, ET AL.,
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V.

MICHAEL A. GALVAN,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 25, 1983, rehearing *en banc* denied September 12, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 710 F.2d 214, *reh. denied*, 716 F.2d 901, (5th Cir. 1983) (Appendix Items 1 and 2). The order of the United States District Court is reproduced in the Appendix as Item 3.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on July 25, 1983. A timely filed petition for rehearing *en banc* was denied on September 12, 1983. The petitioners' application for extension of time for filing petition for writ of certiorari was granted to and including January 10, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sections 1, 2b, 2e, 3, 5, 6, 8(a), and 10(a) of Article 42.12 of the Texas Code of Criminal Procedure are set forth in Item 4 of the Appendix.

STATEMENT OF THE CASE

Michael A. Galvan filed a §1983 suit (42 U.S.C. §1983) against various officials of Travis County, Texas, including the Petitioners — a probation officer, the director of the probation department, and the county probation

department. Respondent Galvan alleged that while on probation for theft, he had been mistakenly arrested and incarcerated for violation of the terms of his probation.

Respondent Galvan had been previously sentenced to three years probation for felony theft. He violated numerous conditions of his probation. On April 9, 1981, Petitioner Grose saw the name "Michael A. Galvan" on a jail list of persons recently arrested, though apparently it was not the Respondent who had been arrested. Petitioner Grose, as a probation officer, filed a report with the district attorney asserting numerous grounds to revoke Respondent's probation and prepared a motion to revoke which was signed by an assistant district attorney. On the basis of this motion, the state district court ordered that a warrant should issue for Respondent's arrest.

The case was tried to a jury. At the close of Galvan's case in chief, the district court directed a verdict for Petitioners on the ground of absolute quasi-judicial immunity. All other defendants were either dismissed prior totrial or on motions subsequent to the directed verdict for Petitioners.

Respondent Galvan appealed only the order of the district court directing a verdict in favor of Petitioners on the basis of absolute immunity. On appeal, Petitioners, urged affirmance of the trial court's decision, arguing that probation officers in Texas are employed by the courts and are an integral part of the judicial phase of the criminal process.

The Court of Appeals reversed and remanded, citing the recent decision in *Harlow v. Fitzgerald*, _____U.S._____, 102 S.Ct. 2727 (1982), as authority for limiting the affirmative defense of Petitioners to one of qualified good faith immunity only.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT

A probation officer prepared a written report detailing Respondent's violations of the terms and conditions of his probation. On the basis of this report, the office of the district attorney signed a motion to revoke probation and an arrest warrant was issued by the state district court. It later appeared that several of the violations listed in the report were erroneous.

The Court of Appeals declined to extend the absolute quasi-judicial immunity it had previously recognized for probation officers who prepare and submit presentence reports in a criminal case.[1] Instead, the Court held the probation officer to be entitled to a qualified immunity. This is in apparent conflict with the ruling of the Ninth Circuit granting quasi-judicial immunity to probation officers. *Harmon v. Superior Court of State of California*, 329 F.2d 154 (9th Cir. 1964).[2]

The Court of Appeals, in declining to affirm the lower court holding that petitioners were entitled to quasi-judicial immunity, cited the recent decision of this Court in *Harlow v. Fitzgerald*, _____U.S._____, 102 S.Ct. 2727 (1982), as controlling. Such reliance on *Harlow* is

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1. *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979).

2. The *Harmon* decision speaks broadly and holds that unspecified acts of "prosecuting defendants" were protected by absolute immunity as related to the judicial process. The later case of *Burkes v. Callion*, 422 F.2d 318 (9th Cir. 1970) *cert. denied*, 403 U.S. 908 (1971), held that probation officers are absolutely immune for preparing and submitting a probation report in a criminal case.

misplaced. Although noting correctly that *Harlow* deals with a federal officer (presidential aides) of the executive branch, the Court failed to distinguish this factor when applying the decision to an employee of the state judicial system. The Court of Appeals, in its cursory examination of the question now presented to this Court, stated only that Petitioner Grose acted at a "phase of the criminal process less intimately associated with the judiciary."

Whether absolute liability extends to the preparation of revocation reports by a probation officer depends upon the function to be protected and whether the act complained of falls within the protective function. *Harlow v. Fitzgerald*, 102 S.Ct. at 2736. In the case herein presented, the probation officer acted in a quasi-judicial capacity much as a prosecutor, who must determine "whether certain purported facts which have been brought to his attention justify the accusation...of a person believed to have committed an offense." *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd* 275 U.S. 503 (1927).

****

The Circuit Court in its examination of the question now presented to this Court distinguished this case from its earlier ruling in *Spaulding, supra*, that federal probation officers are absolutely immune from suit for mistakes committed during the presentence report stage, by stating that probation officers preparing an application to revoke probation are at a "phase...less intimately associated with the judiciary."[3] It can only be inferred that the Court of Appeals did not fully understand the relationship of a probation officer to the judicial system or the role that they play in probation revocations.

Article 42.12 §10(a) of the Texas Code of Criminal Procedure provides that the District Judges in each judicial district shall establish a probation office and employ probation officers. In addition to preparing presentence

3. *Imbler v. Pachtman*, 424 U.S. 409 (1973).

investigations for Judges, probation officers act as the eyes and ears of the Judge in supervising probationers to insure that they comply with the terms and conditions of their probation. In the event that a probationer does not comply with the terms and conditions of probation specified by the Judge, it is the job of a probation officer to present violations of said conditions first to the District Attorney for his review and signature and then to the District Judge. It is then the province of the Judge to determine whether a warrant should be issued for the probationer's arrest. Once a probationer has been arrested, it is his right to request and receive a hearing before the Court if he has not been released on bail within twenty (20) days of the filing of a motion to revoke probation.

This is exactly what happened in the case now before the Court. Under the holding of the Circuit Court in this case and the Supreme Court in earlier cases (*Imbler, supra* and *Stump v. Sparkman*, 435 U.S. 349 (1978)) the district attorney and district judge would be absolutely immune from suit for any mistakes they committed in the process, whereas the probation officers would be subject to suit and possible liability.

Although it is true, as the Court of Appeals suggests, that *Spaulding* was limited to the context of presentence reports, *Id.* at 599 F.2d 729, n.2, the factual similarities between this case and *Spaulding* are strikingly apparent. In both instances, probation officers were to provide information to a court so that the court might make a decision on probation. In both instances, the complaint was that the officers had submitted inaccurate information: in *Spaulding* an erroneous record of a conviction, and here a mistaken report that Respondent had been arrested on two misdemeanor charges. Finally, in both cases it is clear that had the trial judge himself committed the error, no action for damages would lie because the judge would be afforded absolute judicial immunity. *See, e.g. Stump, supra; Henzel v. Gerstein*, 608 F.2d 654, 656-57 (5th Cir.

1979) (Judge absolutely immune except for acts taken in the absence of all jurisdiction).

In short, *Spaulding* and this case present the same question: is a probation officer who acts as a surrogate to the court in the context of a probation decision to be protected from his or her mistakes? In *Spaulding*, the Court of Appeals answered that question affirmatively, after pointing out that the provision of information in a presentence report is a function "intimately associated with the judicial phase of the criminal process...." *Id.* at 599 F.2d 729, quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

The only real difference here, it is submitted, is in the timing of the challenged activity. For under the Court of Appeal's theory, the probation officer who erred at the presentence report stage would be absolutely protected. On the other hand, if the same officer made the same mistake at the revocation stage, he or she would be granted only qualified, good faith immunity. The opinion of the Court below never attempts to justify this disparity in treatment, or explain why Galvan's right to due process of law should be deemed so much greater than Spaulding's as to compel a lesser standard of protection, for the acts of the probation officer.

Instead, the Court of Appeals seeks to evade a logical result by distinguishing *Spaulding* in purely mechanical fashion. First, the Court asserts that Petitioners were not "acting at the express direction of the judge", unlike the defendant in *Spaulding*. Brief for Appellant at pp. 3, 5. In fact, however, *Spaulding* imposed no requirement that before absolute immunity would be appropriate, a probation officer must act at the personal behest of the judge. Indeed, the *Spaulding* court pointed to Rule 32 of the Federal Rules of Criminal Procedure, which provides tha the "probation service of the court *shall* make a presentence investigation and report to the court" unless

the defendant waives the report or the court deems it unnecessary. FED.R.CRIM.PRO. 32 (emphasis added).

In other words, the defendants in *Spaulding* were acting under express statutory authority, just as in this case. Petitioners in the case before the Court acted pursuant to Article 42.12 of the Texas Code of Criminal Procedure. Absolute immunity in *Spaulding* did not hinge on whether the judge asked [the officers] to do any act, but was granted in recognition of the quasi-judicial role probation officers serve. It would make no sense to deny absolute immunity here because the trial court did not personally notify Petitioners to investigate any alleged violations of Respondents probation conditions; that duty is imposed by Section 10(a) of Article 42.12, which should be fully as affective as an oral directive from the court. *See Friedman v. Younger,* 282 F.Supp. 710, 715-716 (D.Cal. 1968) (Construing similar California statute so as to grant absolute immunity to probation officer).

The analysis and application of absolute immunity stated by this Court in *Imbler v. Pachtman,* 424 U.S. 409 (1973), and relied upon by the Fifth Circuit in *Spaulding v. Nielsen* for granting absolute immunity to probation officers in presentencing matters, is equally applicable in this case. In Texas, probation officers are employed by district judges to assist them in performing their judicial duties. If a probation officer is subject to lawsuits for undertaking his duties as the supervising arm of the court, this will very likely impair his judgment and deflect his energies from performing his official duties. Are not the same practical considerations that existed in *Imbler* - the danger of impairing the ability of certain individuals to assist the courts and the potential for vast amounts of litigation - as undesirable for a probation officer as for a district attorney? What plausible justification can there be for not immunizing probation officers who submit partially inaccurate motions to revoke when that protection is afforded to prosecutors who file charges without in-

vestigation? In both cases, as well as in the *Spaulding* situation, the alleged wrongdoer loses his liberty until the error is discovered. In both cases, however, if he sustains a constitutional depriviation, his lack of any redress under Section 1983 is properly considered a lesser evil than a failure to provide the officer absolute immunity. The same practical and policy considerations favoring immunity for prosecutors also exist for probation officers.

The probation officer is a relatively new creature in the judicial theater. Probation officers have come into existence and increased in number to alleviate the burden of judges in supervising those individuals whom they place on probation rather than sentence to jail. Probation is an essential tool in these times of skyrocketing jail populations. Without immunity from the constant threat of litigation a probation officer will not be able to freely exercise his judgment in supervising probationers. In fact, given the threat of litigation, there may be few competent individuals who are willing to serve in the capacity of a probation officer at all. How many individuals would seek the position of judge or prosecutor if they were saddled with the threat of a suit every time a defendant questioned their judgment on a case. The solution is not to provide these individuals with the affirmative defense of good faith immunity, but to afford them the protection historically granted at common law to those who serve the Court — absolute immunity from suit.

The Petitioners in conclusion can only reiterate this Court's quotation in *Imbler* of Judge Learned Hand:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. *Gregoire v. Biddle*, 177 F.2d 579,

581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949, 94 L.Ed. 1363, 70 S.Ct. 803 (1950).

CONCLUSION

For these reasons, Petitioners pray that the petition for writ of certiorari be granted and the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

Item 1

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 82-1261

D.C. Docket No. A-81-CA-286

MICHAEL A. GALVAN
Plaintiff-Appellant,

versus

GILES GARMON, ET AL.,
Defendants-Appellees.

Appeal from the United State District Court
for the Western District of Texas

Before RUBIN, GARZA and WILLIAMS,
Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accor-

dance with the opinion of this court.

July 25, 1983

ISSUED AS MANDATE:

MICHAEL A. GALVAN,
Plaintiff-Appellant

v.

GILES GARMON, et al.
Defendants-Appellees.

No. 82-1261

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

July 25, 1983

Probationer brought section 1983 damage suit against state probation officer who mistakenly caused his arrest and incarceration. The United States District Court for the Wester District of Texas, Lucius Desha Bunton, III, J., directed verdict for probation officer and other defendants on ground that probation officer was cloaked with absolute immunity for her actions. The Court of Appeals held that probation officer was entitled only to qualified immunity.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

PER CURIAM:

We are presented here with the narrow question of whether a state probation officer, who mistakenly causes the arrest and incarceration of a person on probation, may claim absolute or only qualified immunity in a § 1983 damage suit. The district court below directed a verdict for defendant-appellees at the close of plaintiff-appellant's case, on the ground that the probation officer was cloaked with absolute immunity for her actions. Since we find that the probation officer in the immediate case was only entitled to qualified immunity, we vacate the district court's order and remand.

Appellant, Michael Galvan, was sentenced to three years probation on October 24, 1979, on a theft conviction. On April 9, 1981, a person named Michael Galvan was arrested in Austin, Texas, for driving while intoxicated and unlawfully carrying a weapon. Peggy Grose, a Travis County probation officer, notices Galvan's name on the jail roster. Assuming that the person in jail was appellant, she prepared a motion to revoke his probation. An arrest warrant was issued and Galvan was arrested on June 24, 1981. He remained incarcerated for twenty days. The motion to revoke probation was withdrawn on July 13, 1981, when it was ascertained that the person arrested on April 9, 1981, and appellant were different persons.

Appellant then filed this § 1983 suit against a number of individuals including Grose, Giles Garmon, Director of the Travis County Adult Probation Department, and the Travis County Adult Probation Department. Appellant contended that his constitutional rights were violated by the actions of the probation department in erroneously causing his arrest and incarceration. The case went to trial. At the close of plaintiff's case, the district court granted a directed verdict to all defendants on the ground that they were protected by absolute immunity.

Appellant appeals, claiming that appellees are protected only by qualified immunity.

The Supreme Court has recently noted that absolute immunity protects "officials whose special functions or constitutional status requires complete protection from suit", such as legislators, judges, prosecutors and executive officers engaged in adjudicative functions. *Harlow v. Fitzgerald*, ___ U.S. ___ 102 S.Ct. 2727, 2732 73 L.Ed.2d 396 (1982). Although *Harlow* involved a suit brought against a federal officer under the Constitution, the Court said that it would be untenable to draw a distinction between such a suit and one brought against state officers under § 1983. *Id.* 102 S.Ct. at 2738 n. 30 (quoting *Butz v. Economou*, 438 U.S 478, 504, 98 S.Ct. 2894, 2909, 57 L.Ed.2d 895 (1978)). The Court in Harlow noted that absolute immunity for judicial functions "has extended no further than its justification would warrant." *Id.* 102 S.Ct. at 2735. It stated that "[f]or executive officials in general...our cases make plain that qualified immunity represents the norm." *Id.* 102 S.Ct. at 2733. We find that *Harlow* controls this case.

[1] The district court based its decision on *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979). In *Spaulding* this Court held that federal probation officers preparing and submitting a presentence report in a criminal case are protected by absolute immunity because the report is an integral part of the sentencing process and because the officer acts at the direction of the court in preparing the report. His activity, therefore, is " 'intimiately associated with the judicial phase of the criminal process.' " *Id.* at 729 (quoting *Imbler v. Pachtman, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). We find Spaulding* not controlling in the case at hand. Whereas in *Spaulding* the probation officer was acting as the direction of the court during the presentence report process, in the immediate case the probation officer acted at her own initiative and at a different phase of the criminal process less intimately associated with the judiciary. The *Spaulding* court

specifically reserved the question here at issue:

> We have no occasion to decide today, and do not decide, whether immunity will shield probation officers from civil liability for official activities apart from the presentence report process.

599 F.2d at 729 n. 2.

[2] In light of the Supreme Court decision in *Harlow*, as well as the cautionary notes struck in other cases rendered by this Court,[1] we find no absolute immunity in the immediate situation. Qualified immunity, as redefined by the Supreme Court in *Harlow*, permits state officers to be subjected to suits only if the officials' conduct clearly violated an established statutory or constitutional right of which a reasonable person would have known.[2] 102 S.Ct. at 2738. In the immediate case, this standard does not dampen the ardor of public officials and the discharge of their duties. Yet at the same time it keeps an avenue open for vindication of constitutional guarantees. Thus we conclude that the immediate case does not present the sort of "special functions or constitutional status (which) requires complete protection from suit," *Harlow, supra*,

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[1] *See, e.g., Williams v. Rhoden*, 629 F.2d 1099 (5th Cir. 1980); *Douthit v. Jones*, 619 F.2d 527, 534 (5th Cir. 1980 (and cases cited therein).

[2] We do not pass upon either the question of whether appellant has a cause of action under 42 U.S.C. § 1983 or the question of whether appellant has alleged or proved that appellees clearly violated an established constitutional right of which they reasonably should have know. The district court did not reach the qualified immunity issue, we and remand for the court's consideration of this question.

102 S.Ct. at 2732, which would justify further extension of absolute immunity to the immediate case.[3]

REVERSED AND REMANDED.

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[3] In so concluding, we do not pass upon whether appellee Travis County Adult Probation Department is a proper defendant or whether, if it is, if it is to be considered analogous to a municipality. Nor do we pass upon what defenses are available to it if it is to be considered analogous to a municipality. *See Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). These arguments were neither briefed nor asserted on appeal.

Item 2

MICHAEL A. GALVAN,
Plaintiff-Appellant

V.

GILES GARMON, et al.
Defendants-Appellees.

No. 82-1261

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

September 12, 1983

Appeal From the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion July 25, 1983,
5 Cir., 1983, 710 F.2d 214)

Before RUBIN, GARZA and WILLIAMS,
Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

Item 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-81-CA-286

(Filed April 23, 1983)

MICHAEL A. GALVAN,
Plaintiff-Appellant

v.

GILES GARMON, et al.
Defendants-Appellees.

ORDER FOR DIRECTED VERDICT FOR DEFENDANTS GARMON, GROSE AND TRAVIS COUNTY ADULT PROBATION DEPARTMENT

Came on for consideration this day by the Court, after the close of Plaintiff's evidence, Defendants' Motion Pursuant to Federal Rules of Civil Procedure 50(a) for a Directed Verdict for Defendants Peggy Grose, Giles Garmon, and the Travis County Adult Probation Department.

After consideration of the evidence and arguments of counsel, the Court is of the opinion that said Motion should be granted, in that probation officers and the Travis County Adult Probation Department are entitled to absolute, judicial immunity from liability from Plaintiff's claim for damages in this suit. In reaching this decision, the Court follows the rationale of the Fifth Circuit Court of Appeals in *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979), and relies upon the statutory procedures

established by the State of Texas for the appointment, supervision, and compensation of probation officers by the state judiciary as outlined in Article 42.12 TEXAS CODE OF CRIMINAL PROCEDURE, Sections 1, 3, 8(a), and 10(a), (b), and (i). Article 42.12 makes it clear that the probation officers and department are components of the state judiciary. It is therefore

ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Directed Verdict in favor of Peggy Grose, Giles Garmon, and the Travis County Adult Probation Department is hereby granted.

SIGNED AND ORDERED ENTERED on this the 22nd day of April, 1982, at Austin, Texas.

LUCIUS D. BUNTON
United States District Judge

Item 4

Relevant portions of Article 42.12 of the Texas Code of Criminal Procedure are as follows:

Art. 42.12. Adult Probation, Parole, and Mandatory Supervision Law

A. Purpose of Article and Definitions

Section 1. It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probations, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is also the intent of this Article to provide for the release of persons on parole and for the method thereof, to designate the Board of Pardons and Paroles as the responsible agency of State government to recommend determination of paroles and to further designate the Board of Pardons and Paroles as responsible for the investigation and supervision of persons released on parole. It is the intent of this Article to aid all prisoners to readjust to society upon completion of their period of incarceration by providing a program of mandatory supervision for those prisoners not released on parole or through executive clemency and to designate the Board of Pardons and Paroles as the agency of government responsible for the program. It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constituttionality, that have acted as barriers to effective systems of probations and paroles in the public interest.

Sec. 2. b. "Probations" shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the

imposition of sentence is suspended;

e. "Probation officer" shall mean either a person duly appointed by one or more courts of record having original criminal jurisdiction, to supervise defendants placed on probation; or a person designated by such courts for such duties on a part-time basis;

B. Probations

Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendat will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place a the defendant on probation as hereinafter provided. In all cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court.

Sec. 5. (a) Only the court in which the defendant was tried may grant probations, fix or alter conditions, revoke the probation, or discharge the defendant, unless the court has transferred jurisdiction of the case to another court with the latter's consent. Only the judge who originally sentenced the defendant may suspend execution thereof and place the defendant under probation pursuant to Section 3e of this article except that if the judge who

originally sentenced the defendant is deceased or disabled or if the office is vacant and a motion is filed in accordance with Section 3e of this article, the clerk of the court shall promptly forward a copy of the motion to the presiding judge of the administrative judicial district for that court, who may deny the motion without a hearing or appoint a judge to hold a hearing on the motion.

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditios of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer is directed by the judge or probation officer and obey all rules and regulations of the probation department;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within a specified place;

h. Pay his fine, if one be assessed, and all court costs

whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine;

i. Support his dependents;

j. Participate in any community-based program;

k. Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case, if counsel was appointed, or if he was represented by a county-paid publich defender, in an amount that would have been paid to an appointed attorney has the county not had a public defender;

l. Remain under custodial supervision in a community-based facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

m. Pay a percentage of his income to his dependents for their support while under custodial suspension in a community-based facility; and

n. Pay a percentage of his income to the victim of the offense, if any, to compensate the victim for any property damage or medical expenses sustained by the victim as a direct result of the commission of the offense.

Sec. 8. (a) At any time durint the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest

and deterntion to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The state may amend the motion to revoke probation any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interest of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimun prescribed for the offense of which the probationer was convicted.

Sec. 10. (a) For the purpose of providing adequate probation services, the district judge or district judges trying criminal cases in each judicial district in the state shall establish a probation office and employ, in accordance with standards set by the commission, district personnel as may be necessary to conduct presentence investigations, supervise and rehabilitate probationers, and enforce the terms and conditions of misdemeanor and felony probation. If two or more judicial districts serve a county, or a district has more than one county, one district probation department shall serve all courts and counties in the districts. However, the adult probation commission may adopt rules to allow more than one probation department in a judicial district with more than one county if providing more than one probation department will promote administrative convenience or economy or improve probation services.

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FILED
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No. 83-1144

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

GILES GARMON, ET AL.,
Petitioners

V.

MICHAEL A. GALVAN,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

JAMES W. GEORGE
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(512) 477-9651

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QUESTION PRESENTED

I. WHETHER A PROBATION OFFICER AND HIS SUPERVISORS AND HIS DEPARTMENT ARE ABSOLUTELY IMMUNE FROM SUITS FOR DEPRIVATIONS OF CIVIL RIGHTS BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983 OR WHETHER THE PROPER STANDARD OF APPLICATION IN THESE INSTANCES IS QUALIFIED IMMUNITY.

PARTIES

Petitioners are Peggy Grose, Giles Garmon, and the Travis County Adult Probation Department, the defendants in the district court.

Respondent is Michael A. Galvan, the plaintiff in the district court.

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No. 83-1144

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

GILES GARMON, ET AL.,
Petitioners

V.

MICHAEL A. GALVAN,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Respondent respectfully prays that the writ of certiorari prayed for by

Petitioners herein, be in all respects denied and that the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 25, 1983, rehearing en banc denied September 12, 1983, remain undisturbed.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 710 F. 2d 214, reh. denied, 716 F. 2d 901, (501 Cir. 1983) (Appendix Items 1 and 2). The order of the United States District Court is reproduced in the Appendix as Item 3.

JURISDICTION

Respondent does not deny that this Court has jurisdiction of the case herein presented.

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

proper proceeding for redress. For the purposes of this section, any act of congress applicable exclusively to the District of Columbia shall be considered to a be statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, Michael A. Galvan, was sentenced to three years probation on October 24, 1979, on a theft conviction. On April 9, 1981, a person named Michael Galvan was arrested in Austin, Texas, for driving while intoxicated and unlawfully carrying a weapon. Peggy Grose, a Travis County Probation Officer, noticed Galvan's name on the jail roster. Assuming that the person in jail was the Respondent, she prepared a motion to revoke his

probation. An arrest warrant was issued and Galvan was arrested on June 24, 1981. He remained incarcerated for twenty days. The motion to revoke probation was withdrawn on July 13, 1981, when it was ascertained that the person arrested on April 9, 1981, and the Respondent were different persons.

Respondent then filed this Section 1983 suit against a number of individuals including Grose, Giles Garmon, Director of the Travis County Adult Probation Department, and the Travis County Adult Probation Department. Respondent contended that his constitutional rights were violated by the actions of the probation department in erroneously causing his arrest and incarceration. The case went to trial. At the close of

plaintiff's case, the district court granted a directed verdict to all defendants on the ground that they were protected by absolute immunity. Respondent appealed to the Fifth Circuit Court of Appeals and argued that Petitioners are protected only by qualified immunity, and not absolute immmunity.

The Court of Appeals reversed and remanded the district court's decision, citing the recent decision in Harlow v. Fitzgerald, ___ U.S. ____, 102 S.Ct. 2727, 73 L. Ed. 2d 396 (1982) and certain decisions of the Fifth Circuit as authority for limiting the affirmative defense of Petitioners to one of qualified good faith immunity. See Williams v.

Rhoden, 629 F.2d 1099 (5th Cir. 1980) and Douthit v. Jones, 619 F. 2d 527 (5th Cir. 1980).

REASONS WHY THE PETITIONERS' WRIT SHOULD BE DENIED

Spaulding v. Nielson, 599 F. 2d 728 (5th Cir. 1979), the case relied upon by the Petitioners and the trial court for the proposition that the Petitioners should be granted absolute immunity, was properly distinguished from Respondent's cause of action, by the Court of Appeals. In Spaulding the Court ruled that probation officers who make a presentence report at the expressed direction of a judge enjoy absolute immunity from suit for damages under 42 U.S.C. 1983. The Court emphasized in Spaulding that its

decision should be read narrowly and stated "[w]e have no occasion to decide today, and do not decide whether immunity will shield probation officers from civil liability for official activities apart from the presentence report processes." Footnote number 2 at p. 729.

In Galvan v. Garmon, 710 F. 2d 214, 215, (5th Cir. 1983) the Court of Appeals pointed out that whereas in Spaulding the probation officer was acting at the express direction of the judge, in the immediate case the probation officer acted at her own initiative and at a different and much later phase of the criminal process less intimately associated with a judge's directives.

In Galvan the Probation Officer acted in ministerial manner by filing a motion to revoke Mr. Galvan's probation, based on her inaccurate determination that Mr. Galvan committed the subsequent offenses of Driving While Intoxicated and Unlawfully Carrying a Weapon. The probation officer and her department brought the Motion To Revoke Galvan's probation to the judge due to their perceived duty to revoke, not because the judge asked them to do any act, or even knew about the probationer's alleged acts.

The proper rule governing the question of immunity of probation officers was set out in Harris v. Powers, 520 F. Supp. 111 (W.D. Wisc. 1981). In Harris the Plaintiffs sued the probation department

and the probation officer for damages under 42 U.S.C. 1983 because they moved to revoke his probation before he could obtain an adversarial proceeding. In a learned treatment of the immunity caselaw beginning with Imbler v. Pachtman, 424 U.S. 409 (1976) and continuing through Butz v. Economu, 438 U.S. 478, (1978), to date of the Harris decision, the court reasoned that there is a significant difference in treating actions taken in the performance of adjudicatory functions, which are absolutely immune, from those actions taken outside of the performance of such functions, which are not absolutely immune. To qualify as adjudicatory

(1) there must be an adversarial hearing with the official trier of fact wherein each party presents evidence and the parties are entitled to a record of the decision, including findings of fact and conclusions of law; and

(2) the official must make a judgmental act. See Harris at pps. 114 and 115. After considering the facts and after applying the standard of Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court ruled that the defendant's probation officers and their department were not entitled to absolute immunity because their actions of moving to revoke Plaintiff's probation without a hearing did not qualify as an adjudicatory act.

Galvan is much more like Harris than it is like Spaulding, because in Galvan the probation department filed a motion to revoke before a judge even knew about their actions, and Galvan was granted no adversarial hearing prior to the filing of the motion to revoke. Furthermore, in the case of a subsequent offense, the probation officer is acting in a ministerial capacity because motions to revoke probation are automatically filed when a probationer commits a subsequent offense.

In Fowler v. Cross, 635 F. 2d 476 (5th Cir. 1981), the Court held that the Parole Commission, and its employee who had not taken adequate measures to insure prisoners would not be transferred from

the county jail before a preliminary hearing, were not entitled to even assert qualified immunity, let alone absolute immunity. The clear inference from Fowler is that while judges and their probation officers may be immune if the probation officer is acting at the express direction of the judge, those officers are certainly not absolutely immune if they fail to follow proper procedures or act in a ministerial manner outside of the judge's direct orders and outside of the formal adjudication process. The proper standard of analysis in this instance is a qualified immunity standard in keeping with Scheuer v. Rhodes, supra, and its progeny, including Harlow v. Fitzgerald, ____ U.S._____, 102 S.Ct.

2727, 73 L.Ed. 2d. 396 (1982).

Furthermore, the Courts in Harris, Fowler, Scheuer, and Harlow followed the policy enunciated in Henriksen v. Bentley, 664 F. 2d 852, 855 (10th Cir. 1981), that "[A]bsolute immunity has been granted sparingly and only in cases where the public interest in unfettered decision making outweighs the individual interest in relief pursuant to Section 1983." In Henrikson a clerk of court was sued under 1983 for allegedly failing to pick up legal mail mailed to the Post Office by Plaintiff. The Court rejected the Clerk's defense of absolute immunity and stated that the proper test was one of qualified immunity. The Court further placed the burden of proof on the Clerk to establish

his entitlement to immunity.

Henrikson cited Williams v. Wood, 612 F. 2d 982 (5th Cir. 1980) and partly relied on that decision in arriving at its qualified immunity standard. In Williams the appeals court stated that clerks of judges enjoy absolute immunity only when acting in a non-routine manner under command of court decrees or under explicit instructions of a judge, at 985. The Court went on to rule that only qualified immunity attaches to clerks with the exception of the above mentioned narrowly defined limits of absolute immunity. This test should also apply to probation officers, since they are even further removed from the decisions of judges than clerks. Certainly there is no public

interest in the unfettered decision making of individual probation officers, many of whom are undertrained and under qualified. And under the Petitioner's theory, such probation officers would not be liable for their actions even if Plaintiffs could prove they acted with actual malice in denying Constitutionally protected rights.

Henrikson, Williams, Fowler, and Harris and now Harlow trace their reasoning from the United States Supreme Court's pronouncements on the question of immunity and government officials. This Court has stated that absolute immunity can not be freely extended beyond the long recognized common law protection granted to judges acting in their official

capacities, Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L. Ed. 2d 288 (1967),; State legislators acting within their sphere of legitimate legislative activity, Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed 1019 (1951); and State prosecuting attorneys fulfilling their duties of initiating and pursuing criminal prosecuting in presenting the states' case, Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed 2d 128 (1976). Indeed, the modern trend has been to abandon the absolute immunity standard in almost all instances and to adopt a general rule in suits involving section 1983 of qualified immunity.

In the landmark cases of Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40

L. Ed 90 (1974), and Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 214 (1975), the Court held that the rule governing the actions of governmental officials should be one of qualified immunity. In so doing, the court stated "that...qualified immunity is based upon the scope of discretiion and responsibilities of the office and all circumstances as they reasonably appear at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formated at the time and in light of all circumstances, coupled with good-faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of

official conduct." Id. at 247-48.

This concept of qualified immunity was further refined in Wood v. Strickland, supra, where the Court held that a school official is not immune from damages under Section 1983 if his action can not be reasonably characterized as being in good faith. "The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled undisputed law on the part of one entrusted with the supervision of student's daily lives than by the presence of actual malice." Id at 321. Respondent submits that these are the proper considerations to apply when the trier of

fact is determining whether immunity should attach, not an absolute immunity standard which is blindly applied in disregard of the real facts of the particular case.

In Harlow v. Fitzgerald, ___ U.S.__, 102 S. Ct. 2727, 73 L.Ed 2c 396 (1982) the Court cited Butz v. Economu, supra, for the proposition that the "alter ego" theory of immunity is rejected. This Court noted that Mr. Butz would be granted only qualified immunity even though he was the Secretary of Agriculture on the President's cabinet, and the Court further noted that the greater power an official has, the greater potential there is for lawless conduct. At 73 L. Ed. 2d 404. So, the Petitioners argument that they

should be accorded derivative absolute immunity based on the judge's absolute immunity should also fail; it sweeps too far and allows for too great a potential for abuse by probation officers who are often far removed from a judge, and are certainly much further removed from the various judges than a member of the Cabinet is removed from the President.

Harmon v. Superior Court of State of California, 329 F.2d 154 (9th Cir. 1964) and Burkes v. Callion, 433 F. 2d 318 (9th Cir. 1970) cert. denied, 403 U.S. 908 (1971), the cases relied upon by Petitioners for the proposition that there is a conflict of opinion within the Courts of Appeal as to the degree of immunity

which should be accorded to probation officers, were decided long before the above cited decisions of Scheuer v. Rhodes, supra, Wood v. Strickland, supra, Butz v. Economou, supra, and Harlow v. Fitzgerald, supra. The Burkes and Harmon Courts ruled in the manner they did because they lacked this Court's guidance. The Court of Appeals in Galvan however recognized the long standing doctrine of qualified immunity as set out in the above cases and properly accorded only qualified immunity to the Petitioners; therefore, there is not a legitimate conflict of opinion within the nation's Courts of Appeal on the issue presented herein which would justify this Court's consideration of Petitioners' cause.

It is also important to remember that the Courts have consistently granted only qualified immunity to police officers in civil rights actions brought under 42 U.S.C. Section 1983, Glasson v. City of Louisville, 518 F 2d. 899 (C.A. Kentucky 1975), cert denied, 423 U.S. 930, 96 S. Ct. 280, 46 L. Ed. 2d 258. If a police officer is granted only qualified immunity when he is often forced to act in a split second life and death situation, how is it justifiable to accord a probation officer absolute immunity, when he has had ample time to review his files, interview witnesses and arresting authorities, and check data and vital statistics in the comfort of his air conditioned office? The Court of Appeals recognized that such

a ruling would be untenable and properly restricted the granting of absolute immunity to the previously stated narrow limitations.

In addition to allow a standard of absolute immunity to extend to individual probation officers regardless of how far their actions are removed from a judge's order or control would thwart the intent of Section 1983 since the very purpose of the statute is to give parties deprived of constitutional rights, privileges, and immunities a remedy against an official's abuse of his position. Monroe v. Pape, 365 U.S. 175, 81 S. Ct. 473, 5 L. Ed 2d 492 (1973). To allow Probation Departments and Probation officers to run roughshod over probationers' rights in a

non-adjudicatory proceedings all the while shouting "absolute immunity!" would unnecessarily undermine the very foundation and thrust of section 1983.

Also, the trial court's holding that Tex. Code Crim. Proc. Ann. art. 42.12 places probation departments within the purview of State courts does not cloak Petitioners with absolute immunity in a federal civil rights action. Said statute states: "It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constitutionality (emphasis added), that have acted as barriers to effective systems of probations and paroles in the public interest." It is obvious that the intent of Article 42.12 is not to

completely cast aside Respondent Galvan's constitutional rights as protected by 42 U.S.C. Section 1983 by allowing the probation officers and their department to hide behind the shield that they are appendages of the State Courts; and even if such an intent were the case, the Texas statute is pre-empted by 42 U.S.C. 1983, and therefore is of no force or effect in Respondent's federal civil rights action. See Gibson v. Bass River Tp. 82 F.R.D. 122, D.C.N.J. 1979.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petition for Writ of Certiorari be in all respects

denied and that this Court not disturb the Court of Appeals' ruling herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Respondent's Brief In Opposition to Petitioners' Petition for Writ of Certiorari, was this day mailed to Mr. Charles R. Burton, MINTON, BURTON, FOSTER & COLLINS, 1100 Guadalupe Street, Austin,

Texas 78701; and Ms. Leslie A. Benitez, Assistant Attorney General of the State of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

Dated: March 30, 1984.

JAMES W. GEORGE

APPENDIX

Item 1

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 82-1261

D.C. Docket No. A-81-CA-286

MICHAEL A. GALVAN
Plaintiff-Appellant,

versus

GILES GARMON, ET AL.,
Defendants-Appellees.

Appeal from the United State District Court
for the Western District of Texas

Before RUBIN, GARZA and WILLIAMS,
Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accor-

dance with the opinion of this court.

July 25, 1983

ISSUED AS MANDATE:

MICHAEL A. GALVAN,
Plaintiff-Appellant

v.

GILES GARMON, et al.
Defendants-Appellees.

No. 82-1261

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

July 25, 1983

Probationer brought section 1983 damage suit against state probation officer who mistakenly caused his arrest and incarceration. The United States District Court for the Wester District of Texas, Lucius Desha Bunton, III, J., directed verdict for probation officer and other defendants on ground that probation officer was cloaked with absolute immunity for her actions. The Court of Appeals held that probation officer was entitled only to qualified immunity.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

PER CURIAM:

We are presented here with the narrow question of whether a state probation officer, who mistakenly causes the arrest and incarceration of a person on probation, may claim absolute or only qualified immunity in a § 1983 damage suit. The district court below directed a verdict for defendant-appellees at the close of plaintiff-appellant's case, on the ground that the probation officer was cloaked with absolute immunity for her actions. Since we find that the probation officer in the immediate case was only entitled to qualified immunity, we vacate the district court's order and remand.

Appellant, Michael Galvan, was sentenced to three years probation on October 24, 1979, on a theft conviction. On April 9, 1981, a person named Michael Galvan was arrested in Austin, Texas, for driving while intoxicated and unlawfully carrying a weapon. Peggy Grose, a Travis County probation officer, notices Galvan's name on the jail roster. Assuming that the person in jail was appellant, she prepared a motion to revoke his probation. An arrest warrant was issued and Galvan was arrested on June 24, 1981. He remained incarcerated for twenty days. The motion to revoke probation was withdrawn on July 13, 1981, when it was ascertained that the person arrested on April 9, 1981, and appellant were different persons.

Appellant then filed this § 1983 suit against a number of individuals including Grose, Giles Garmon, Director of the Travis County Adult Probation Department, and the Travis County Adult Probation Department. Appellant contended that his constitutional rights were violated by the actions of the probation department in erroneously causing his arrest and incarceration. The case went to trial. At the close of plaintiff's case, the district court granted a directed verdict to all defendants on the ground that they were protected by absolute immunity.

Appellant appeals, claiming that appellees are protected only by qualified immunity.

The Supreme Court has recently noted that absolute immunity protects "officials whose special functions or constitutional status requires complete protection from suit", such as legislators, judges, prosecutors and executive officers engaged in adjudicative functions. *Harlow v. Fitzgerald*, ___ U.S. ___ 102 S.Ct. 2727, 2732 73 L.Ed.2d 396 (1982). Although *Harlow* involved a suit brought against a federal officer under the Constitution, the Court said that it would be untenable to draw a distinction between such a suit and one brought against state officers under § 1983. *Id.* 102 S.Ct. at 2738 n. 30 (quoting *Butz v. Economou*, 438 U.S 478, 504, 98 S.Ct. 2894, 2909, 57 L.Ed.2d 895 (1978)). The Court in Harlow noted that absolute immunity for judicial functions "has extended no further than its justification would warrant." *Id.* 102 S.Ct. at 2735. It stated that "[f]or executive officials in general...our cases make plain that qualified immunity represents the norm." *Id.* 102 S.Ct. at 2733. We find that *Harlow* controls this case.

[1] The district court based its decision on *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979). In *Spaulding* this Court held that federal probation officers preparing and submitting a presentence report in a criminal case are protected by absolute immunity because the report is an integral part of the sentencing process and because the officer acts at the direction of the court in preparing the report. His activity, therefore, is " 'intimiately associated with the judicial phase of the criminal process.' " *Id.* at 729 (quoting *Imbler v. Pachtman, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). We find Spaulding* not controlling in the case at hand. Whereas in *Spaulding* the probation officer was acting as the direction of the court during the presentence report process, in the immediate case the probation officer acted at her own initiative and at a different phase of the criminal process less intimately associated with the judiciary. The *Spaulding* court

specifically reserved the question here at issue:

> We have no occasion to decide today, and do not decide, whether immunity will shield probation officers from civil liability for official activities apart from the presentence report process.

599 F.2d at 729 n. 2.

[2] In light of the Supreme Court decision in *Harlow*, as well as the cautionary notes struck in other cases rendered by this Court,[1] we find no absolute immunity in the immediate situation. Qualified immunity, as redefined by the Supreme Court in *Harlow*, permits state officers to be subjected to suits only if the officials' conduct clearly violated an established statutory or constitutional right of which a reasonable person would have known.[2] 102 S.Ct. at 2738. In the immediate case, this standard does not dampen the ardor of public officials and the discharge of their duties. Yet at the same time it keeps an avenue open for vindication of constitutional guarantees. Thus we conclude that the immediate case does not present the sort of "special functions or constitutional status (which) requires complete protection from suit," *Harlow, supra*,

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[1] *See, e.g., Williams v. Rhoden*, 629 F.2d 1099 (5th Cir. 1980); *Douthit v. Jones*, 619 F.2d 527, 534 (5th Cir. 1980 (and cases cited therein).

[2] We do not pass upon either the question of whether appellant has a cause of action under 42 U.S.C. § 1983 or the question of whether appellant has alleged or proved that appellees clearly violated an established constitutional right of which they reasonably should have know. The district court did not reach the qualified immunity issue, we and remand for the court's consideration of this question.

102 S.Ct. at 2732, which would justify further extension of absolute immunity to the immediate case.[3]

REVERSED AND REMANDED.

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[3] In so concluding, we do not pass upon whether appellee Travis County Adult Probation Department is a proper defendant or whether, if it is, if it is to be considered analogous to a municipality. Nor do we pass upon what defenses are available to it if it is to be considered analogous to a municipality. *See Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). These arguments were neither briefed nor asserted on appeal.

Item 2

MICHAEL A. GALVAN,
Plaintiff-Appellant

V.

GILES GARMON, et al.
Defendants-Appellees.

No. 82-1261

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

September 12, 1983

Appeal From the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion July 25, 1983,
5 Cir., 1983, 710 F.2d 214)

Before RUBIN, GARZA and WILLIAMS,
Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

Item 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-81-CA-286

(Filed April 23, 1983)

MICHAEL A. GALVAN,
Plaintiff-Appellant

v.

GILES GARMON, et al.
Defendants-Appellees.

ORDER FOR DIRECTED VERDICT FOR DEFENDANTS GARMON, GROSE AND TRAVIS COUNTY ADULT PROBATION DEPARTMENT

Came on for consideration this day by the Court, after the close of Plaintiff's evidence, Defendants' Motion Pursuant to Federal Rules of Civil Procedure 50(a) for a Directed Verdict for Defendants Peggy Grose, Giles Garmon, and the Travis County Adult Probation Department.

After consideration of the evidence and arguments of counsel, the Court is of the opinion that said Motion should be granted, in that probation officers and the Travis County Adult Probation Department are entitled to absolute, judicial immunity from liability from Plaintiff's claim for damages in this suit. In reaching this decision, the Court follows the rationale of the Fifth Circuit Court of Appeals in *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979), and relies upon the statutory procedures

established by the State of Texas for the appointment, supervision, and compensation of probation officers by the state judiciary as outlined in Article 42.12 TEXAS CODE OF CRIMINAL PROCEDURE, Sections 1, 3, 8(a), and 10(a), (b), and (i). Article 42.12 makes it clear that the probation officers and department are components of the state judiciary. It is therefore

ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Directed Verdict in favor of Peggy Grose, Giles Garmon, and the Travis County Adult Probation Department is hereby granted.

SIGNED AND ORDERED ENTERED on this the 22nd day of April, 1982, at Austin, Texas.

LUCIUS D. BUNTON
United States District Judge